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**ORIGINAL**

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of

Telecommunications Carriers' Use  
of Customer Proprietary Network Information  
and Other Customer Information

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CC Docket No. 96-115

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**FURTHER COMMENTS OF WORLDCOM**

Catherine R. Sloan  
David N. Porter  
Richard L. Fruchterman  
Richard S. Whitt

WORLDCOM, INC.  
1120 Connecticut Avenue, N.W.  
Suite 400  
Washington, D.C. 20036  
(202) 776-1550

Its Attorneys

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## **SUMMARY**

WorldCom believes that the statutory structure created by Congress to govern carrier use of CPNI is premised on the same central point raised by WorldCom in its earlier comments -- namely, that the BOCs uniquely have access to competitively-valuable and highly sensitive information about their customers. Based on this irrefutable fact, Congress established a clear dichotomy in the 1996 Act between the actions of the BOCs and their affiliates, and the actions of all other unaffiliated entities, with regard to CPNI. In particular, while Section 222 establishes certain minimal requirements applicable to all common carriers in using and disclosing their customers' CPNI, Section 272 of the Act goes much further to create unequivocal nondiscrimination requirements with which each BOC and its affiliates must comply in their provision or use of the CPNI of the BOC's customers.

In its Non-Accounting Safeguards Order, the Commission concluded correctly that Section 272(c)(1) establishes an unqualified prohibition against discrimination by a BOC in its dealings with its Section 272 affiliate vis-a-vis unaffiliated entities. The Commission found that a BOC must provide to unaffiliated entities the same goods, services, facilities, and information that it provides to its Section 272 affiliate, and at the same rates, terms, and conditions.

When read in conjunction with Section 222, Section 272(c)(1) plainly requires that a BOC may use, disclose, or permit access to CPNI for or on behalf of its affiliate only if the CPNI is also made available to all other entities on the very same terms and conditions. In interpreting the interplay between Section 222 and Section 272, the Commission must adopt rules that establish the following basic principles:

- o Non-BOCs are not bound by Section 272, and thus are permitted to treat their own affiliates differently than other entities. In particular, non-BOCs are not required to treat their affiliates as third parties for which the customers' affirmative written requests must be secured before CPNI can be disclosed, and

are not required to disclose CPNI to unaffiliated entities under the same standard for customer approval as is permitted in connection with their own affiliates.

- o If carriers must gain a customer's affirmative written request in order to use, disclose, or permit access to that customer's CPNI, that same limitation must be imposed on all BOC affiliates as well.
- o If carriers need only obtain non-written customer approval before accessing that customer's CPNI, a BOC must disclose CPNI to unaffiliated entities under this same standard.
- o Upon customer approval, the BOC is only able to give its affiliate access to CPNI if all other unaffiliated entities are given access to CPNI at the same time and in the same manner.
- o Section 272 does not permit a BOC to solicit customer approval to use CPNI on behalf of its affiliate. Instead, Section 272 requires imposing on the BOC a bright-line distinction between soliciting a customer for use of CPNI (which is prohibited), and granting access to CPNI (which is required). The BOC's Section 272 affiliate, like all other unaffiliated entities, must solicit customers for approval to use their CPNI.
- o Should the Commission decide (incorrectly) to allow the BOCs to provide approval solicitation service to their affiliates, Section 272 requires the BOCs to provide this same service, in the same manner, to all other unaffiliated entities on a nondiscriminatory basis. The BOCs must be held to an "all or nothing" standard, under which the BOCs must receive approval from a customer either to release CPNI to all carriers, or release CPNI to no carriers. Further, once approval is granted, a BOC must provide the customer's CPNI to unaffiliated entities on the very same rates, terms, and conditions as it provides the CPNI to its Section 272 affiliate.
- o Section 272(g)(3), governing BOC joint marketing and sales, creates a narrow exception to the Section 272 nondiscrimination requirement. The statute creates a fundamental distinction between seeking customer approval to use CPNI for marketing and sales efforts (Section 222), and actually marketing and selling service (Section 272(g)). Thus, where a BOC accesses CPNI, it must do so for all parties on a nondiscriminatory basis; where that same BOC subsequently seeks to jointly market or sell service, it is permitted to do so outside the nondiscrimination requirement. In any event, CPNI is not "essential" for a BOC or its affiliate to engage in joint marketing and sales activities.
- o The requirements of Section 272(e)(2) cover CPNI associated with a BOC's exchange access service, and all long distance and local customers of that service.

- o A BOC's seeking of customer approval to use, disclose, or permit access to CPNI for or on behalf of its Section 272 affiliate (if permitted by the FCC) constitutes a "transaction" under Section 272(b)(5). A BOC affiliate must conduct such an approval solicitation service on an arm's length basis, as defined in the FCC's rules. Procedurally, the affiliate must reduce all its solicitation transactions to writing and make such writing available for public disclosure.
- o Section 272(b)(1), which states that the Section 272 affiliate "shall operate independently" from the BOC, prohibits the Section 272 affiliate from providing or coordinating any of its CPNI-related functions in conjunction with the BOC.

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**FURTHER COMMENTS OF WORLDCOM**

WorldCom, Inc. ("WorldCom"), hereby files its further comments in response to the questions posed by the Common Carrier Bureau ("Bureau") in its Public Notice ("Notice"), DA 97-385, released on February 20, 1997 in the above-referenced proceeding.

**I. INTRODUCTION AND SUMMARY**

In its initial and reply comments in this proceeding,<sup>1</sup> WorldCom commented on a wide range of issues related to the proper interpretation of Section 222 of the Telecommunications Act of 1996. The overriding principle of that provision, however, is that every telecommunications carrier has a duty to protect the confidentiality of customer proprietary network information ("CPNI") related to its customers and other competing telecommunications carriers. In particular, Congress indicated that Section 222 is intended to "balance both competitive and consumer privacy interests with respect to CPNI."<sup>2</sup> WorldCom urged the Commission to adopt rules in this proceeding which fully implement Congress' intent.

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<sup>1</sup> See Comments of LDDS WorldCom, CC Docket No. 96-115, filed June 11, 1996 ("WorldCom Comments"); Reply Comments of LDDS WorldCom, CC Docket No. 96-115, filed June 26, 1996 ("WorldCom Reply Comments").

<sup>2</sup> See Joint Explanatory Statement of the Committee of Conference, at 88.

At the same time, WorldCom pointed out that the Commission cannot overlook the fact that incumbent local exchange carriers ("ILECs") such as the Bell Operating Companies ("BOCs") -- solely because of their traditional monopoly role in the local exchange and exchange access markets -- have unfettered access to all the CPNI of their local exchange customers. This includes these customers' competitively-valuable and highly sensitive long distance CPNI, as well as comparable information for every customer of a competitive local exchange carrier "(CLEC)" if the CLEC uses either unbundled network elements or resells ILEC services. By contrast, no competing carrier, including CLECs, interexchange carriers ("IXCs"), or competitive access providers ("CAPs"), can hope to match the ubiquitous and all-inclusive nature of the proprietary information gathered and utilized by the BOC, all without the informed consent of end user customers.

Thus, while all carrier customers have been granted statutorily-guaranteed privacy rights in their CPNI, the CPNI controlled by the dominant ILECs is both far more valuable and far more vulnerable to misuse. Given this crucial disparity between dominant ILECs and other telecommunications service providers, and the potential negative impact of this disparity on competitive and consumer privacy interests, WorldCom urged the Commission to target its rules to the CPNI collected and controlled by the dominant ILECs in their privileged monopoly role as provider of local exchange and exchange access services.

In its Public Notice, the Bureau "seeks further comments to supplement the record in the CPNI proceeding on specific issues relating to the subjects previously noticed in this proceeding and their interplay with sections 272 and 274."<sup>3</sup> The Notice includes a list of

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<sup>3</sup> Notice at 2.

questions, and asks commenters to cite "specific statutory language or legislative history that support their arguments and address the impact of their positions on customer privacy and competition."<sup>4</sup>

As will be explained in more detail below,<sup>5</sup> the statutory structure created by Congress to govern CPNI is premised on the same irrefutable point raised by WorldCom in its earlier comments -- namely, that the BOCs uniquely have access to competitively-valuable and highly sensitive information about their customers. Based on this fact, Congress established a clear dichotomy in the 1996 Act between the actions of the BOCs and their affiliates, and all other unaffiliated entities, with regard to CPNI. In particular, while Section 222 establishes certain minimal requirements applicable to all common carriers in using and disclosing their customers' CPNI, Section 272 of the Act goes further to create unequivocal nondiscrimination requirements, including publication requirements, with which each BOC and its affiliates must comply in their provision or use of the CPNI of the BOC's customers. The Commission must devise federal CPNI rules that mirror this statutory dichotomy, and thereby not only protect consumer privacy but also do not allow the incumbents to leverage CPNI to the advantage of their Section 272 affiliate.

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<sup>4</sup> Id.

<sup>5</sup> In these further comments, WorldCom will only address those questions concerning the interplay between Section 222 and Section 272. WorldCom reserves the right to respond in reply comments to arguments raised concerning other aspects of the Public Notice.



## **II. INTERPLAY BETWEEN SECTION 222 AND SECTION 272**

### **A. Using, Disclosing, and Permitting Access to CPNI**

1. (a) Does the requirement in section 272(c)(1) that a BOC may not discriminate between its section 272 "affiliate and any other entity in the provision or procurement of....services....and information..." mean that a BOC may use, disclose, or permit access to CPNI for or on behalf of that affiliate only if the CPNI is made available to all entities?

Yes. Section 272(c)(1) broadly prohibits discrimination between a BOC's affiliate and any other entity. In its Non-Accounting Safeguards Order,<sup>6</sup> the Commission concluded that Section 272(c)(1) represents nothing short of "an unqualified prohibition against discrimination by a BOC in its dealings with its section 272 affiliate and unaffiliated entities."<sup>7</sup> Because the text does not include a bar against "unreasonable" or "unjust" discrimination, the Commission found that Section 272(e)(1) presents "a more stringent standard" than Section 202(a) of the Communications Act.<sup>8</sup> As a result, the Commission found that "BOCs must treat all other entities in the same manner as they treat their section 272 affiliates," meaning that "a BOC must provide to unaffiliated entities the same goods, services, facilities, and information that it provides to its section 272 affiliate at the same rates, terms, and conditions."<sup>9</sup> The

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<sup>6</sup> Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-149, FCC 96-489, released December 24, 1996 ("Non-Accounting Safeguards Order").

<sup>7</sup> Non-Accounting Safeguards Order at para. 197.

<sup>8</sup> Id.; see 47 U.S.C. § 202(a).

<sup>9</sup> Non-Accounting Safeguards Order at para. 202.

Commission indicated that it intends to construe the terms of section 272(c)(1) broadly,<sup>10</sup> so that the nondiscrimination protection offered by this provision "extends to any good, service, facility, or information that a BOC provides to its section 272 affiliate."<sup>11</sup>

When read in conjunction with Section 222, Section 272(c)(1) plainly requires that a BOC may use, disclose, or permit access to CPNI for or on behalf of its affiliate only if the CPNI is also made available to all other entities on the very same terms and conditions. By its plain meaning, Section 272(c)(1) covers a BOC's "dealings with its affiliate," including the "provision of ... information" such as CPNI. Moreover, nothing in Section 222 -- or, indeed, any other provision of the Act -- indicates that Section 272(c)(1) does not apply to the CPNI provisions of the Act. This interpretation is consistent with the Commission's own broad view of Section 272(c)(1) as an "unqualified prohibition" against disparate treatment of affiliates and unaffiliated entities. Indeed, there is no other reasonable interpretation of Section 272(c)(1).

**(b) If not, what obligation does the nondiscrimination requirement of section 272(c)(1) impose on a BOC with respect to the use, disclosure, or permission of access to CPNI?**

N/A

**2. If a telecommunications carrier may disclose a customer's CPNI to a third party only pursuant to the customer's "affirmative written request" under section 222(c)(2), does the nondiscrimination requirement of section 272(c)(1) mandate that a BOC's section 272**

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<sup>10</sup> Id. at para. 216.

<sup>11</sup> Id. at para. 218.

**affiliate be treated as a third party for which the BOC must have a customer's affirmative written request before disclosing CPNI to that affiliate?**

Yes. As explained in response to Question 1, Section 272(c)(1) requires that a BOC, "in its dealings with its affiliate," cannot discriminate between that affiliate and any other entity. If the Commission concludes that all third parties can only receive a customer's CPNI through its "affirmative written request," that same limitation must be imposed on all BOC affiliates as well. Otherwise, the BOCs will be able to provide information and services to their affiliates that they will not provide to all other entities. This interpretation is also consistent with Congress' stated concerns about balancing competitive and consumer privacy interests; competitive equity is well served by the BOCs' even-handed treatment of all non-BOC entities under Section 272(c)(1), while consumer privacy is assured by requiring all entities, including BOC affiliates, to secure a customer's affirmative written request to use CPNI.

**3. (a) If a telecommunications carrier may disclose a customer's CPNI to a third party only pursuant to the customer's "affirmative written request" under section 222(c)(2), must carriers, including interexchange carriers and independent local exchange carriers (LECs), treat their affiliates and other intra-company operating units (such as those that originate interexchange telecommunications services in areas where the carriers provide telephone exchange service and exchange access) as third parties for which customers' affirmative written requests must be secured before CPNI can be disclosed?**

No. Section 272(c)(1) expressly applies only to a BOC and its affiliate. All other non-BOC entities -- including unaffiliated IXC's, CLECs, and CAPs -- are not required to treat

themselves or their affiliates the same way they treat any other unaffiliated entities. In other words, the broad nondiscrimination overlay provided by Section 272(c)(1) reaches only the BOCs and their affiliates, and does not apply to all carriers in interpreting Section 222. As WorldCom explained previously, this Congressional design makes perfect sense in light of the BOCs' longstanding ubiquitous control over valuable and vulnerable CPNI that the BOC (for the most part) has been free to use without prior notification or informed consent by customers. Therefore, in interpreting Section 222, non-BOCs are permitted to treat their affiliates differently than other entities, and are not required to treat their affiliates as third parties for which the customers' affirmative written requests must be secured before CPNI can be disclosed.

**(b) Must the answer to this question be the same as the answer to question 2?**

No. As explained above, the difference in the responses to Questions 2 and 3 is that Congress intended that the overarching nondiscrimination mandate of Section 272(c)(1) applies only to the BOCs and their affiliates.

**B. Customer Approval**

**4. (a) If sections 222(c)(1) and 222(c)(2) require customer approval, but not an affirmative written request, before a carrier may use, disclose, or permit access to CPNI, must a BOC disclose CPNI to unaffiliated entities under the same standard for customer approval as is permitted in connection with its section 272 affiliate?**

Yes. Section 272(c)(1) requires that the BOC not discriminate between its affiliate and any other entity in providing services or information. Thus, should the Commission decide

that carriers are required to obtain non-written customer approval before using, disclosing, or permitting access to CPNI, a BOC must disclose CPNI to unaffiliated entities under the same standard for customer approval as is permitted in connection with its Section 272 affiliate. Again, this result comports both with the clear dichotomy established by Congress between BOCs and non-BOCs, and Congress' stated concerns about competitive equity and protection of customer privacy interest.

**(b) If, for example, a BOC may disclose CPNI to its section 272 affiliate pursuant to a customer's oral approval or a customer's failure to request non-disclosure after receiving notice of an intent to disclose (i.e., opt-out approval) is the BOC required to disclose CPNI to unaffiliated entities upon the customer's approval pursuant to the same method?**

Yes. Section 272(c)(1) requires that the BOC not discriminate between its affiliate and any other entity in providing services or information. Under this strict standard, the BOC's affiliate and an unaffiliated entity must stand in the very same shoes with reference to the BOC. Thus, upon customer approval, the BOC is only able to give its affiliate access to CPNI if all other unaffiliated entities are given access to CPNI at the same time and in the same manner. The clear intent of Congress, and alleviating concerns about competitive equity and protection of customer privacy interests, can only be fulfilled in this interpretation.

**5. If sections 222(c)(1) and 222(c)(2) require customer approval, but not an affirmative written request, before a carrier may use, disclose, or permit access to CPNI, must each carrier including interexchange carriers and independent LECs, disclose CPNI to**

**unaffiliated entities under the same standard for customer approval as is permitted in connection with their affiliates and other intra-company operating units?**

No. As explained above in response to Question 3, Section 272(c)(1) expressly applies only to a BOC and its affiliate. All other non-BOC entities -- including unaffiliated IXC's, CLECs, and CAPs -- are not required to treat themselves or their affiliates the same way they treat any other unaffiliated entities. In other words, in interpreting Section 222, the broad nondiscrimination overlay provided by Section 272(c)(1) reaches only the BOCs and their affiliates, and no one else. Therefore, in interpreting Section 222, non-BOCs may treat their affiliates differently than other entities, and are not required to disclose CPNI to unaffiliated entities under the same standard for customer approval as is permitted in connection with their affiliates.

**6. (a) Must a BOC that solicits customer approval, whether oral, written, or opt-out, on behalf of its section 272 affiliate also offer to solicit that approval on behalf of unaffiliated entities? That is, must the BOC offer an "approval solicitation service" to unaffiliated entities, when it provides such a service for its section 272 affiliate?**

WorldCom does not accept the premise of this question, namely, that Section 272 permits a BOC to solicit customer approval to use CPNI on behalf of its affiliate. The strict nondiscrimination requirement of 272(c)(1) forbids the combination of a BOC's unique role as ubiquitous collector and provider of CPNI, and the function of soliciting customers for use of that same CPNI. The inherent biases built into such an arrangement will always favor the BOC's affiliate, to the obvious competitive detriment of all unaffiliated entities. Instead, Section

272 requires imposing on the BOC a bright-line distinction between soliciting a customer for use of CPNI (which is prohibited), and granting access to CPNI (which is required). The BOC's Section 272 affiliate, like all other unaffiliated entities, must solicit customers for approval to use their CPNI.

Nonetheless, should the Commission decide -- incorrectly -- to allow the BOCs to provide an "approval solicitation service," that service must be offered absolutely free from any discriminatory taint. BOC provision of an approval solicitation service to its own affiliate clearly comes within the scope of Section 272(c)(1), which by its own terms includes all services a BOC provides to its affiliate. As a result, the BOC must provide this same service, in the same manner, to all other unaffiliated entities on a nondiscriminatory basis. However, WorldCom believes that allowing a BOC to solicit CPNI from its customers on behalf of its affiliate, and other unaffiliated entities, creates obvious discrimination concerns. For example, what procedures will the BOC use to solicit the CPNI? How will the BOC ensure that all entities are treated exactly the same in the solicitation process, and that its own affiliate is not unduly favored in any way, subtle or otherwise? Moreover, how can the Commission successfully police this process, and fully enforce all violations of Section 272(c)(1)?

To prevent the very real threat of a discriminatory service that favors the BOC's affiliate, WorldCom urges the Commission to hold the BOCs to an "all or nothing" standard. In other words, the BOC must receive approval from a customer either to release CPNI to all carriers, or release CPNI to no carriers. For example, if a BOC customer indicates to the BOC representative that he or she wants CPNI released to both the BOC affiliate and WorldCom, the only requesting carrier, then CPNI can be released to both carriers. If, on the other hand, the

customer approves releasing CPNI to the BOC affiliate, but not to WorldCom, then no CPNI can be released. Both the BOC affiliate and WorldCom are then free on their own to seek the customer's approval of CPNI release. This "all or nothing" standard creates a pro-competitive incentive for the BOC to treat every carrier's CPNI release request as if it were its own affiliate's request. While WorldCom believes that Section 272(c)(1) prohibits BOC approval solicitations altogether, an "all or nothing" solicitation standard is only way that the Commission can allow the BOCs to solicit on behalf of their affiliates. Otherwise, the Commission can never guarantee that all unaffiliated entities will have access to a BOC's approval solicitation service on the very same terms and conditions.

**(b) If so, what specific steps, if any, must a BOC take to ensure that any solicitation it makes to obtain customer approval does not favor its section 272 affiliate over unaffiliated entities?**

As indicated above, WorldCom believes that Section 272(c)(1) prohibits the BOCs from providing an approval solicitation service on behalf of their Section 272 affiliates. Should the Commission nonetheless decide (incorrectly) to allow the BOCs to provide such a service, the BOCs must provide it to all entities, including its own affiliate, pursuant to federal tariff, on the very same rates, terms, and conditions. The Commission must adopt an "all or nothing" standard that corrects the obvious discrimination concerns that would be created by allowing the BOCs to provide approval solicitation service in the first place. In addition, pursuant to Section 272(b)(5) of the Act,<sup>12</sup> the BOC would be required to reduce to writing every solicitation

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<sup>12</sup> 47 U.S.C. § 272(b)(5).



transaction and make available such records for public inspection.

**(c) If the customer approves disclosure to both the BOC's section 272 affiliate and unaffiliated entities, must a BOC provide the customer's CPNI to the unaffiliated entities on the same rates, terms, and conditions (including service intervals) as it provides the CPNI to its section 272 affiliate?**

Yes. As indicated above, should the Commission decide -- incorrectly -- to allow the BOCs to provide approval solicitation service, Section 272(c)(1) requires that the BOC cannot discriminate when it provides service and information to its own affiliate. Therefore, the customer must approve disclosure to both the BOC affiliate and any requesting unaffiliated entity in order for such access to be granted. Section 272(c)(1) further mandates that, once approval is granted, the BOC must provide the customer's CPNI to the unaffiliated entity on the same rates, terms, and conditions as it provides the CPNI to its Section 272 affiliate. This mandate includes providing CPNI to the unaffiliated entity on the same service intervals, and in the same electronic format, as it is provided to the BOC's affiliate.

**C. Other Issues**

**7. (a) If, under sections 222(c)(1), 222(c)(2), and 272(c)(1), a BOC must not discriminate between its section 272 affiliate and non-affiliates with regard to the use, disclosure, or the permission of access to CPNI, what is the meaning of section 272(g)(3), which exempts the activities described in sections 272(g)(1) and 272(g)(2) from the nondiscrimination obligations of section 272(c)(1)?**

While Section 222 and Section 271(c)(1) together require that the BOC not discriminate between its affiliate and unaffiliated entities in the provision or use of CPNI, Section 272(g) governs the BOCs' joint marketing and sale of retail services.<sup>13</sup> Section 272(g)(3) stipulates that subsections (g)(1) and (g)(2), which state the conditions under which the BOCs are authorized to engage in the joint marketing and sale of services, "shall not be considered to violate the nondiscrimination provisions" of Section 272(c).<sup>14</sup> On its face, while the statute requires that the BOCs abide by the broad nondiscrimination requirement in all respects, including the provision or use of CPNI, Section 272(g)(3) creates a narrow exception for BOC joint marketing and sales. That is, while affiliate transactions subject to Section 272(c)(1) remain so, joint BOC/affiliate contacts with customers and prospective customers would not per se violate that provision's prohibition against discrimination in favor of a BOC affiliate.

**(b) What specific obligations with respect to the use, disclosure, and permission of access to CPNI do sections 222(c)(1) and 222(c)(2) impose on a BOC that is engaged in the activities described in sections 272(g)(1) and 272(g)(2)?**

As explained above, Section 222 and Section 271(c)(1) together govern the nondiscriminatory provision of CPNI by the BOCs, while Section 272(g) governs the BOCs' provision of joint marketing and sales of service. Section 272(g)(3) states in effect that the actual process of a BOC affiliate jointly marketing or selling BOC exchange services to

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<sup>13</sup> 47 U.S.C. § 272(g).

<sup>14</sup> 47 U.S.C. § 272(g)(3).

customers will not be deemed to violate the otherwise applicable nondiscrimination requirements of Section 272(c)(1). Where a BOC uses, discloses, or permits access to CPNI, then, it must do so on a nondiscriminatory basis; where that same BOC then subsequently seeks to jointly market or sell service, it is permitted to do so outside the nondiscrimination requirement. Thus, under this statutory dichotomy, a BOC is not required to jointly market or sell its retail services on behalf of other unaffiliated entities.

**8. (a) To what extent is soliciting customer approval to use, disclose, or permit access to CPNI an activity described in section 272(g)?**

As explained in response to Question 6 above, WorldCom does not accept the premise that the BOCs are permitted to solicit customer approval to use, disclose, or permit access to CPNI on behalf of their affiliates. This role would be wholly incompatible with the strict nondiscrimination dictates of Section 272(c)(1). Instead, the BOC's affiliates are free to solicit customer approval to use, disclose, or permit access to CPNI, and then, upon customer approval, to request access to CPNI from the BOC.

Nonetheless, should the Commission decide -- incorrectly -- that the BOCs are permitted to solicit customer approval to use, disclose, or permit access to CPNI, this function is not equivalent to the joint marketing or sale of services. The statute itself recognizes a fundamental distinction between (1) seeking prior customer approval to use information for marketing and sales efforts, and (2) actually marketing and selling service to the public. Depending on the Commission's ultimate conclusions in this proceeding on what constitutes customer notification and approval, it is possible that a carrier could carry out these two distinct

functions in the same verbal or written solicitation. However, the fact that one function could eventually lead to the other is not the same thing as saying that these two functions are one and the same, or that they are inextricably intertwined. Thus, soliciting customer approval to use, disclose, or permit access to CPNI is not an activity described in Section 272(g).

**(b) To the extent that a party claims that CPNI is essential for a BOC or section 272 affiliate to engage in any of the activities described in section 272(g), please describe in detail the basis for that position. To the extent that a party claims that CPNI is not essential for a BOC or section 272 affiliate to engage in those activities, please describe in detail the basis for that position.**

As indicated above, Section 272(c)(1) does not authorize the BOCs to solicit customer approval to use, disclose, or permit access to CPNI. Only the BOCs' affiliates are allowed to perform this function.

Nonetheless, soliciting customer approval to use, disclose, or permit access to CPNI is not an activity described in Section 272(g). Moreover, while there is no doubt that CPNI certainly can be very helpful in some cases in a carrier's marketing and sales efforts, it is a considerable (and unsupported) stretch to term CPNI "essential" for a BOC or Section 272 affiliate to engage in joint marketing and sales activities pursuant to Section 272(g).

Even if CPNI were somehow deemed "essential" to a BOC's marketing and sales efforts -- which the statute does not warrant and WorldCom does not concede -- it does not follow that CPNI must be automatically considered part of the BOCs' marketing and sales effort, and thus wholly exempt from the Act's nondiscrimination requirements. In fact, the reverse is

true. As the Commission itself has determined, Section 272(c)(1) constitutes "an unqualified prohibition against discrimination by a BOC in its dealings with its section 272 affiliate and unaffiliated entities."<sup>15</sup> Because Section 272(g)(3) does not explicitly do so, the Commission is not empowered to discern an exception to the broad mandate that "a BOC must provide to unaffiliated entities the same goods, services, facilities, and information that it provides to its section 272 affiliate at the same rates, terms, and conditions."<sup>16</sup> WorldCom believes that the proper way to reconcile Section 272(c)(1) and Section 272(g) is to allow the BOC affiliate, and not the BOC itself, to solicit customer approval to use, disclose, or permit access to CPNI.

In any event, on its own terms Section 272(g) reaches only BOC marketing and sales; there is absolutely no implication that CPNI is included in this exception. Where the broad nondiscrimination language of Section 272(c)(1) meets the narrowly-tailored exception of Section 272(g)(3), the Commission should not deliberately expand the reach of the former far beyond its textual context.

**9. (a) Does the phrase "information concerning [a BOC's] provision of exchange access" in section 272(e)(2) include CPNI as defined in section 222(f)(1)?**

Yes. Section 272(e)(2) states that a BOC cannot provide "any facilities, services, or information concerning its provision of exchange access" to its own affiliate unless such facilities, services, or information "are made available to other providers of interLATA services

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<sup>15</sup> Non-Structural Safeguards Order at para. 197.

<sup>16</sup> Id. at para. 202.

in that market on the same terms and conditions."<sup>17</sup> On its face, the provision reaches "any... information" concerning a BOC's exchange access services, which would include both CPNI for all exchange access customers, such as IXC's and other carriers, and those same carriers' local end user customers. Thus, the requirements of Section 272(e)(2) appear to cover CPNI associated with a BOC's exchange access service, and all local customers of that service.

**(b) Does the phrase "services...concerning [a BOC's] provision of exchange access" in section 272(e)(2) include CPNI-related approval solicitation services?**

Yes. Section 272(e)(2) on its face reaches "any... services" concerning a BOC's exchange access services, which would include CPNI-related "approval solicitation services." As in response to Question 9(a) above, the requirements of Section 272(e)(2) cover those CPNI-related approval solicitation services associated with a BOC's exchange access services; these include both services for all exchange access customers, such as IXC's and other carriers, and those same carriers' local end user customers.

**(c) If such information or services are included, what must a BOC do to comply with the requirement in section 272(e)(2) that a BOC "shall not provide any...services...or information concerning its provision of exchange access to [its affiliate] unless such...services....or information are made available to other providers of interLATA services in that market on the same terms and conditions"?**

In order to comply with Section 272(e)(2), a BOC must provide CPNI and CPNI-

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<sup>17</sup> 47 U.S.C. § 272(e)(2).

related approval solicitation services derived from its exchange access service to all providers of interLATA services in its market on the "same terms and conditions." There are at least three possible ways to meet this statutory requirement. First, the BOCs could be required to include provision of CPNI and (if permitted) CPNI-related approval solicitation services in their federal access tariffs, and provide such information and services to all entities (including their own affiliates) pursuant to those tariffs. Second, under Section 272(b)(5),<sup>18</sup> the BOCs could be required to reduce all such CPNI transactions to writing and make them available for public inspection (see response to Question 10 below). Third, the Commission could establish a Section 272(e)(2) public disclosure requirement limited to the BOCs' provision of CPNI and (if permitted) CPNI-related approval solicitation services.<sup>19</sup> WorldCom prefers the first option -- inclusion in federal access tariffs -- as the best means of satisfying the statutory requirement that the BOCs provide CPNI and related services derived from exchange access to other providers on the same terms and conditions.

**10. (a) Does a BOC's seeking of customer approval to use, disclose, or permit access to CPNI for or on behalf of its section 272 affiliate constitute a "transaction" under section 272(b)(5)?**

As explained in response to Question 6 above, WorldCom does not accept the

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<sup>18</sup> 47 U.S.C. § 272(b)(5).

<sup>19</sup> In the Non-Accounting Safeguards Order, the Commission declined to require the RBOCs to abide by a general public disclosure rule under Section 272(b)(5). See Non-Accounting Safeguards Order at para. 252. However, this conclusion does not prevent the development and enforcement of a specific public disclosure requirement limited to CPNI and CPNI-related approval solicitation services.

premise that the BOCs are permitted to solicit customer approval to use, disclose, or permit access to CPNI on behalf of their affiliates. This role would be wholly incompatible with the strict nondiscrimination dictates of Section 272(c)(1). Instead, the BOC's affiliates are free to solicit customer approval to use, disclose, or permit access to CPNI, and then, upon customer approval, to request access to CPNI from the BOC.

Nonetheless, whether the Commission requires the affiliate to solicit customer approval to use disclose, or permit access to CPNI, or instead (incorrectly) allows the BOC to perform this function, the answer to Question 10(a) in both cases is yes. Section 272(b)(5) requires that a BOC's Section 272 affiliate must conduct "all transactions" with the affiliated BOC "on an arm's length basis," reducing such transactions to writing and making them available for public inspection.<sup>20</sup> Given the statutory emphasis on "all transactions," without any qualification, this provision should be read as including any BOC attempts to seeks customer approval to use, disclose, or permit access to CPNI for or on behalf of its Section 272 affiliate.

**(b) If so, what steps, if any must a BOC and its section 272 affiliate take to comply with the requirements of section 272(b)(5) for purposes of CPNI?**

In order to comply with Section 272(b)(5), a BOC affiliate must conduct its CPNI-related approval solicitation service on an arm's length basis, as defined in the FCC's rules. Procedurally, the affiliate must reduce all its solicitation transactions to writing and make such writing available for public disclosure. The Commission discussed this particular writing

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<sup>20</sup> 47 U.S.C. § 272(b)(5).



requirement at some length in its Accounting Safeguards Order.<sup>21</sup> The Commission found that, at minimum, the BOC affiliate must provide a detailed written description of the service, and the terms and conditions of the transaction, within 10 days of the transaction, and post such information on its home page on the Internet.<sup>22</sup> The same requirement should apply to the BOCs' CPNI-related approval solicitation services.

**11. Please comment on any other issues relating to the interplay between sections 222 and 272.**

Another pertinent provision of Section 272 not mentioned in the Bureau's Public Notice is Section 272(b)(1), which states that the Section 272 affiliate "shall operate independently" from the BOC. When read in conjunction with Section 222, this provision appears to prohibit the Section 272 affiliate from providing or coordinating any of its CPNI-related functions with the BOC.<sup>23</sup> The Commission concluded in the Non-Accounting Safeguards Order that Section 272(b)(1) imposes requirements separate and distinct from the other requirements listed in Sections 272(b)(2)-(5).<sup>24</sup> WorldCom believes that the "operate independently" requirement of Section 272(b)(1), like the nondiscrimination requirement of

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<sup>21</sup> See Accounting Safeguards Under the Telecommunications Act of 1996, Report and Order, CC Docket No. 96-150, FCC 96-490, released December 24, 1996, at para. 122 ("Accounting Safeguards Order").

<sup>22</sup> Id.

<sup>23</sup> Interestingly, while the Act stipulates that the RBOCs' joint marketing and sales efforts are not bound by the nondiscrimination requirements of Section 272(c), the "operate independently" proviso of Section 272(b)(1) does apply to those operations.

<sup>24</sup> Non-Accounting Safeguards Order at para. 156.